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Zahidah bt Ahmad v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–113–05 OF 2014
MOHTARUDIN BAKI, ZAKARIA SAM AND ABDUL KARIM JJCA
12 JANUARY 2017

C *Criminal Law — Appeal — Appeal against conviction and sentence — Appellant convicted of offence of murder under s 302 of the Penal Code and sentenced to death — Whether deceased's cause of death unascertained — Whether natural cause namely asthma had not been ruled out as possible cause of death — Whether smothering likely or in all probability would have caused* D *death of deceased — Whether trial judge failed to address fine distinction between murder and culpable homicide not amounting to murder under ss 299 and 300 of the Code — Whether fit and proper case for conviction under s 304(a) of the Code — Penal Code ss 34, 299, 300, 302 & 304(a)*

E The appellant and one Maznah bt Abdussomad ('the first accused in the court below') were charged with the murder of their stepmother, one Tanziah bt Zainuddin ('the deceased') under s 302 of the Penal Code ('the Code') read together with s 34 of the Code. It was the prosecution's case that the appellant had smothered the deceased by using a pillow ('P44') and this was supported by F the evidence of a friend of the appellant ('SP12') who testified that she saw the appellant smothered the deceased. In defence, the appellant denied her involvement in the murder of the deceased. The High Court found the appellant guilty of the offence and sentenced her to death. It must be noted that the first accused in the court below was also found guilty of the offence, G nevertheless, as the first accused was a child under the Child Act 2001 at the time of the commission of the offence, she was detained at the pleasure of the Ruler of the State until she was truly rehabilitated. In the present appeal, the appellant appealed against the conviction and sentence and submitted that this was a fit and proper case for a conviction under s 304(a) of the Code and not H s 302 of the Code for the reasons that: (a) it was undisputed that the deceased cause of death was unascertained and the natural cause namely asthma had not been ruled out as a possible cause of death; (b) SP11, the pathologist did not express any opinion that the act of smothering was likely or in all probability would have caused the death of the deceased; and (c) the trial judge failed to I address the fine distinction between murder and culpable homicide not amounting to murder under ss 299 and 300 of the Code ie the nexus between the appellant's action and the deceased's cause of death.

Held, setting aside the conviction of the appellant for the offence of murder

and substituting it with the conviction under s 304(a) of the Code; and sentencing the appellant to 30 years imprisonment with effect from date of arrest:

(1) There was no evidence led by SP11 that the act of smothering was likely or in all probability would have caused the death. SP11 stated that the cause of death could not be identified and it was probable that the death was due to natural cause. In fact, SP11 confirmed that the deceased suffered from asthma two years before her death. Based on the facts that the deceased was 72 year old asthmatic patient, it was not improbable that the deceased could have succumbed to an asthmatic attack. On this issue, the prosecution failed to adduce any medical evidence to exclude such possibility. There was also no blood or DNA of the deceased found on P44. In addition, the learned trial judge did not address the fine distinction between ss 299 and 300 of the Code before coming to his conclusion. In light of the nature of the medical evidence given by SP11, the present appeal would fall within the second part of s 299 of the Code. This was a case which could reasonably be brought within the lesser offence of culpable homicide not amounting to murder under s 304(a) of the Code (see paras 28 & 31–36).

[Bahasa Malaysia summary

Perayu dan seorang bernama Maznah bt Abdussomad ('tertuduh pertama di Mahkamah Tinggi') dituduh membunuh ibu tiri mereka, seorang bernama Tanziah bt Zainuddin ('si mati') di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama-sama dengan s 34 Kanun. Ia adalah kes pihak pendakwaan bahawa perayu telah menekap si mati dengan bantal ('P44') dan ini disokong oleh keterangan kawan perayu ('SP12') yang memberi keterangan bahawa dia melihat perayu menekap muka si mati. Dalam pembelaan, perayu menafikan penglibatan dia dalam pembunuhan si mati. Mahkamah Tinggi mendapati perayu bersalah terhadap kesalahan dan menjatuhkan hukuman mati. Ia mesti diambil perhatian bahawa tertuduh pertama di Mahkamah Tinggi juga adalah didapati bersalah terhadap kesalahan, walau bagaimanapun, memandangkan tertuduh pertama adalah kanak-kanak di bawah Akta Kanak-Kanak 2001 pada masa perlakuan kesalahan, dia ditahan di bawah perkenan Pemerintah Negeri sehingga dia benar-benar pulih. Dalam rayuan ini, perayu merayu terhadap sabitan dan hukuman dan berhujah bahawa ini adalah kes wajar dan betul untuk sabitan di bawah s 304(a) Kanun dan bukan s 302 Kanun untuk alasan bahawa: (a) ia tidak dipertikaikan bahawa sebab kematian si mati telah dipastikan dan sebab semulajadi iaitu asma tidak diketepikan sebagai kemungkinan penyebab kematian; (b) SP11, patologi tidak menyatakan apa-apa pandangan bahawa tindakan menekap muka mungkin atau dalam kemungkinan keseluruhannya akan menyebabkan kematian si mati; dan (c) hakim bicara gagal untuk mempertimbangkan perbezaan jelas di antara pembunuhan dan homisid salah yang tidak menjumlahkan kepada

pembunuhan di bawah ss 299 dan 300 Kanun iaitu hubungan di antara tindakan perayu dan sebab kematian si mati.

Diputuskan, mengetepikan sabitan perayu bagi kesalahan pembunuhan dan menggantikannya dengan sabitan di bawah s 304(a) Kanun; dan menjatuhkan hukuman ke atas perayu 30 tahun penjara berkuat kuasa dari tarikh penangkapan:

(1) Tidak terdapat keterangan yang dikemukakan oleh SP11 bahawa tindakan menekap muka adalah mungkin atau secara keseluruhan berkemungkinan akan menyebabkan kematian. SP11 menyatakan bahawa sebab kematian tidak dapat dikenal pasti dan ia adalah berkemungkinan bahawa kematian adalah akibat punca semulajadi. Sebenarnya, SP11 mengesahkan bahawa si mati menderita kerana asma dua tahun sebelum kematiannya. Berdasarkan atas fakta si mati adalah 72 tahun pesakit asma, ia adalah berkemungkinan bahawa si mati boleh meninggal dunia akibat serangan asma. Atas isu ini, pihak pendakwaan gagal untuk mengemukakan apa-apa keterangan perubatan untuk mengecualikan kemungkinan sedemikian. Juga tidak terdapat darah atau DNA si mati didapati pada P44. Selanjutnya, hakim bicara yang bijaksana tidak mempertimbangkan perbezaan jelas di antara ss 299 dan 300 Kanun sebelum mencapai kesimpulannya. Berdasarkan sifat keterangan perubatan yang diberikan oleh SP11, rayuan ini akan terangkum dalam bahagian kedua s 299 Kanun. Ini adalah kes yang mungkin boleh secara munasabah boleh terangkum dalam kesalahan yang lebih ringan homisid salah yang tidak menjumlahkan kepada pembunuhan di bawah s 304(a) Kanun (lihat perenggan 28 & 31–36).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 42–89.

Cases referred to

Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Legislation referred to

Child Act 2001
Penal Code ss 299, 300, 302, 304(a)

Appeal from: Criminal Trial No 45B-71–03 of 2013 (High Court, Shah Alam)

Edmund Bon Tai Soon (Joshue Tay Hing Foong and Lee Shee Pin with him) (Amerbon Advocates) for the appellant.

Farah Ezlin Yusop Khan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zakaria Sam JCA:

INTRODUCTION

[1] In the High Court at Shah Alam, Selangor, the appellant ('the second accused') and one Maznah bt Abdussomad ('the first accused') were charged with the murder of their stepmother, Tanziah bt Zainuddin. The charge was as follows:

> Bahawa kamu bersama-sama pada 14 Julai 2012 jam lebih kurang 5.30 petang bertempat di alamat No 2, Lorong Kiyai Sujak 20B, Taman Sri Wangi, Kapar di dalam Daerah Klang, di dalam negeri Selangor Darul Ehsan dalam mencapai niat bersama kamu berdua, telah melakukan bunuh dengan menyebabkan kematian terhadap Tanziah binti Zainuddin (No KPT: 400803-71-5230) dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

[2] At the end of the defence case, the court held that the prosecution had proven the charge against both the appellant and the first accused beyond reasonable doubt. They were found guilty of the charge.

[3] As the first accused was a child under the Child Act 2001 at the time of the commission of the offence, she was detained at the pleasure of the Ruler of the State until she was truly rehabilitated.

[4] For the appellant, she was sentenced to death.

[5] This is the appellant's appeal against the whole decision.

[6] The first accused did not file any appeal against the said decision.

THE PROSECUTION'S CASE

[7] The prosecution's case was ably narrated by the trial judge as follows.

[8] The evidence of the prosecution witnesses showed the presence of five persons at the residence of the deceased on the day of incident. They were the appellant, the first accused, a friend of the appellant by the name of Normah bt Abu Bakar ('SP12'), the deceased and her husband Hj Ahmad bin Sakimin ('SP3'). A daughter of the deceased by the name of Maryam bt Abdussomad ('SP2') had visited the deceased on the same day but had left the house after a while.

[9] SP3, a resident 'Imam' had left for prayers at 4.20pm at a nearby *surau*. At that point of time he saw the deceased sleeping in the living room whilst the appellant, the first accused and SP12 were in various parts of the house. When he returned after prayers at about 6pm, he saw the deceased still lying in the living room, but her motionless body and her false teeth lying near her, aroused his suspicion that something was not right. At the same time he did not see the appellant and the first accused or SP12. SP3 then alerted his neighbors and a while later the ambulance arrived. It was then confirmed that the deceased had died.

[10] The family members gathered to accord the deceased a burial. There was however an uneasiness and suspicion on the part of the family members that all was not well. Their suspicion was aroused by the fact that there were bruises on the body of the deceased while bathing her body. The family members however decided that, to avoid any delay in the burial and to prevent any inconvenience caused if the matter was reported to the police, to proceed with the burial.

[11] However in the next couple of days after questioning the first accused, the family members decided that there was an element of foul play in the death of the deceased. A police report was then lodged and the police obtained a court order to exhume the body of the deceased. A post-mortem was duly done but because the decomposition the pathologist could not determine the cause of death. This could be seen from the post-mortem report ('P23').

[12] A breakthrough in the police investigation was made on the complaint by the deceased family that a gold bracelet normally worn by the deceased was missing. On investigation the police managed to track down the missing bracelet worn by the deceased at a pawn shop.

[13] The persons responsible for pawning the bracelet were identified as Mohammad Sidek bin Othman ('SP6') and his son Muhammad Zumri bin Mohammad Sidek ('SP7'). Both SP6 and SP7 were hauled up by the police and on questioning the police discovered that SP7 was the boyfriend of the appellant.

[14] On further questioning, it was discovered that the gold bracelet was given to SP7 by the appellant who was in need of money. The questioning of SP7 also led the police to the appellant who was subsequently arrested in a budget hotel with SP12.

[15] The appellant after being questioned, led Insp Jagjeet Singh a/l Hazura Singh ('SP8') to the house where the deceased was found dead, to retrieve the murder weapon which was found to be a pillow. The pillow was sent for

forensic investigation. Upon examination of the pillow with the pillow case, the chemist noted a blood stain. On analysis the blood stain matched the DNA of the appellant.

[16] SP12 who turned a state witness narrated that on the day in question she went to the house of the deceased to ask for financial aid. Before that, she had once requested the help of SP3 and knowing SP3 was a local *imam*, she believed that he could collect funds on her behalf. SP3 however turned down the SP12's request and this had resulted SP12 to turn to the appellant.

[17] According to SP12, the appellant suggested a way out of her predicament by asking SP12 to take part in a plot to kill the deceased. According to the appellant this would solve SP12's the financial problem and herself as well as the problem of the first accused who was despaired by the constant nagging from the deceased.

[18] According to SP12, she was a reluctant participant in killing the death of the deceased. According to SP12's testimony, the main role played by the first accused and the appellant who used a pillow to smother the deceased while she herself held the leg of the deceased. When the deceased finally succumbed to the attack, the appellant removed the gold bracelet and all three of them fled the scene. The first accused went to her fiance's house whereas the appellant and SP12 ended up in a budget hotel with the help of SP7.

THE FINDING AT THE END OF PROSECUTION'S CASE

[19] The trial judge ruled that the prosecution had proven a prima facie case. Both the appellant and the first accused were called to enter their defence.

DEFENCE CASE

[20] The appellant gave evidence on oath, while the first accused gave statement from the dock.

[21] Basically the first accused's defence was of a bare denial. In a nutshell she stated that she was not at the scene of the crime as she had left to go to her fiance's house.

[22] Apart from denying taking any part in the death of the deceased, the appellant had further alleged that all the prosecution witnesses implicating her were lying. The appellant denied that she had given the gold bracelet to SP7 to sell the same and she also denied that SP7 had given her some money for the bracelet and that she had given that money to SP12.

[23] The appellant alleged that SP8 was lying that she had given information leading to the discovery of the pillow. According to the appellant she had no knowledge of the pillow. She further asserted that the police had found the pillow themselves.

[24] Finally, the appellant said that SP12 bore a grudge against her pertaining her child's issue which had prompted SP12 to lodge a police report against her husband. The appellant further denied that she had discussed a plan with the first accused and SP12 to kill the deceased.

FINDING AT THE END OF DEFENCE CASE

[25] The court ruled both the appellant and the first accused had failed to raise any reasonable doubt on the prosecution's case. The prosecution therefore had proven the charge against both of them beyond reasonable doubt. They were found guilty and convicted of the charge and sentenced accordingly.

THE APPEAL

[26] Before us learned counsel for the appellant submitted that this is a fit and proper case for a conviction under s 304(a) and not s 302 of the Penal Code for the following reasons:

(a) it is undisputed that the deceased cause of death is unascertained and the natural cause namely asthma has not been ruled out as a possible cause of death;

(b) SP11, the pathologist, did not express any opinion that the act of smothering is likely or in all probability would have caused the death; and

(c) the trial judge failed to address the fine distinction between murder and culpable homicide not amounting to murder under ss 299–300 of the Penal Code — the nexus between the appellant's action and the deceased's cause of death.

[27] The learned deputy public prosecutor conceded that the cause of death could not be ascertained due to the bad decomposition of the body. She also conceded that the deceased was suffering from asthma. She however submitted the murder was pre-planned and the prosecution is relying very much on the evidence of SP12.

OUR DECISION

[28] We are in agreement with the submission of learned counsel for the appellant that there was no evidence led from SP11, the pathologist, that the act of smothering is likely or in all probability would have caused the death.

[29] In a charge for murder it would not be an overstatement to say that the crux of the case depends on expert evidence on the cause of death and evidence that links the injuries inflicted by the perpetrator to the death of the deceased.

[30] In the appeal before us, SP11 who conducted the post-mortem on the deceased, in her postmortem examination report ('P23') concluded 'In my opinion, the cause of death was unascertained' (at p 626, Vol 6 records of appeal).

[31] To questions posed by the trial judge, SP11 clarified that the deceased's cause of death cannot be identified and it is probable that the deceased death was due to natural causes (see p 24, Vol 3 of records of appeal):

S:	Dari postmortem ini, bolehkah dapat tahu atau tidak yang si mati ini mati kerana natural causes atau pun telah dibunuh?
J:	Tidak boleh pastikan.
S:	So, ada kemungkinan dia mati natural causes pun boleh?
J:	Saya tidak boleh kata tidak pada soalan itu.
S:	So berkemungkinan boleh kedua-duanya?
S:	Ya, sebab saya tak pasti kesemuanya.

[32] Evidence through the cross-examination of SP1 (at p 61, Vol 1 records of appeal) confirmed that the deceased suffered from asthma two years before her death.

[33] The learned trial judge was also in doubt as to the cause of death due to the medical evidence provided by SP11 where the deceased's cause of death was unascertainable (at p 2, Vol 1 of record of appeal):

> a matter which bothered me more than the evidence of an accomplice was inconclusive postmortem report as to the cause of death of the deceased.

[34] Considering the fact that the deceased was a 72 year old asthmatic patient, it is not improbable that the deceased could have succumbed to an asthmatic attack. On this issue, the prosecution failed to adduce any medical

A evidence to exclude such possibility. We also mindful of the fact that no blood or DNA of the deceased found on the pillow ('P44') which was allegedly used to smother the deceased to death.

B **[35]** We noted that the learned trial judge in his decision did not address the fine distinction between ss 299 and 300 of the Penal Code before coming to his conclusion: see *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174.

C **[36]** In view of the nature of the medical evidence given by the pathologist as earlier highlighted, it is our considered view that the present appeal would fall within the second part of s 299 of the Penal Code. It is our judgment that this is a case which can reasonably be brought within the lesser offence of culpable homicide not amounting to murder, that is under s 304(a) of the Penal Code.

D CONCLUSION

[37] For the reasons above stated, we set aside the conviction of the appellant for the offence of murder and substituted it with one under s 304(a) of the Penal Code and sentenced the appellant to 30 years imprisonment with effect from date of arrest.

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Conviction of appellant for offence of murder set aside and substituted with conviction under s 304(a) of the Code; and appellant sentenced to 30 years imprisonment with effect from date of arrest.

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Reported by Dzulqarnain Ab Fatar

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